Reply Br. of King & Robeson

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

MILTON C. CONNERS, Jr.,
Administrator,

v.

THE UNITED STATES and the NORTHERN CHEYENNE TRIBE OF INDIANS.

No. 44.

APPEAL FROM THE COURT OF CLAIMS.

Reply Brief for Appellant.

WILLIAM B. KING,
W. H. ROBESON,
Attorneys for Appellant.



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REPLY BRIEF FOR APPELLANT.

The brief of the Assistant Attorney-General admitting that a mere body of Indians united for a common purpose, is not a band within the meaning of the act of March 3, 1891, but that the body must have other properties, offers an issue so different from that presented by the opinion of the court, that it becomes necessary briefly to consider the case in its changed aspect.

The defendants now say (1) that the test of an organization among Indians is independence of other Indian authority; and (2) that such independence is achieved by the hostility of the body to the United States.

Before discussing these two propositions we ask attention to the composition of this body of Indians known in this case as Dull Knife's band, as declared by the court. We say:

(1) That the band did not have an organization (if it ever had one) until fired upon by the troops:

(2) That the band had no chief having authority;

(3) That it had never been recognized by the Indians or by the Government as a separate body;

(4) That if there was ever an organization of Dull Knife's band it was involuntary as to the Indians, having been effected by the hostile act of the troops in firing upon them;

(5) That the party was an insignificant minority of the Northern Cheyenne tribe, containing no foreign elements.

We have asserted that the Court of Claims was governed largely by the dictionary definition of the word "band." Evidence of this is found in the very last clause of the findings in this case, in these words:

"The *tribe* of Northern Cheyenne Indians was in amity with the United States, with the exception of those who composed the *bands* of Dull Knife and Little Wolf."

The opposed use of the words "tribe" and "band" in this sentence can not be taken to have any other meaning than that the court was considering the status of *a band of a tribe* of Indians.

It is our purpose to show that such has been the governing idea of the court in other decisions. In the case of *Herring* (32 C. Cls. 536) the court said:

"A band being the lowest and smallest sub-division, confederates more readily than any other form of corporate existence so to speak, and may be composed of Indians of different tribes or nations, and becomes a *de facto* band by the extent of its membership, its continuity of existence, and its persistent cohesion, subject to the control and power of a leader having the recognized authority of a commander and chief."

What the court meant by "a *de facto* band" must be "a body of armed men," as the lexicographer puts it.

In the case of *Dobbs* (33 C. Cls. 308, 314) the court says, Nott (Ch. J.) delivering the opinion, that it departs

from its earlier position that a band is a body recognized as such by a treaty, or by the laws, or by the Indians, and that it will now recognize as bands those—

"which simply in fact existed, irrespective of recognition either by the Department of the Interior or the Indian tribes from which the members of the band came."

What can this mean but to declare that a "body of armed men," if Indians, is a band within the intent of the statute?

From these positions the Assistant Attorney-General dissents, saying in his brief in the companion case of *Montoya*, No. 43:

"It is admitted of course that there might be a band of Indians confederated together for a purpose which would be wholly lawful, and that a band of Indians might be confederated together even for an unlawful purpose—

* * * * * * *

without bringing themselves within the meaning of the statute."

But he continues, in effect, that if such a body is independent of other Indian authority, or if it become actually hostile, then it is a band within the statute.

Temporary Independence Not the Test.

If we admit that such a body of Indians, becoming independent of other Indian authority, is a band, as contemplated by the statute, we yet can not assent to that definition of independence which seems not to contemplate anything more than a mere temporary separation of the body from the parent tribe or tribes, during which it engaged in hostile acts.

By nature all Indians, we may say, owe an allegiance to Indian authority. It is not an allegiance based upon an intelligent comprehension of the necessity for govern-

ment and for fidelity thereto. The allegiance the savage owed was one of blood and birth. It was not to the organization, compelled by laws, but to the people, compelled by nature. So, when we speak of the independence of a body of Indians, not established by the recognition either of the Government or of the Indian tribes themselves, the inquiry goes rather to racial affinity than to a political independence such as civilized peoples achieve.

Dull Knife was a Northern Cheyenne as thoroughly as a Jew is not a Gentile. He spoke a different language from the Sioux, with whom his tribe was in a measure affiliated. He was different from an Apache in natural nobility of character. He differed from all Indians in the blood in his veins. He "belonged" therefore, to use the word of the statute, to the Northern Cheyenne tribe. He would have belonged to the Cheyenne tribe, but for the previous voluntary separation of that tribe into the Northern tribe and the Southern tribe and the prompt and continuous recognition by all authorities of the separated bodies.

Dull Knife's band, or to use the court's expression, "Dull Knife's party," had not received recognition as an independent body by the Indians, the Government officers or the laws—as the court specifically finds. More than this—it had not sought independence; and at the very time it was fired upon *it was secretly on its way back to its own people.*

Nor was the transfer of the body of Northern Cheyennes such a separation by the authorities as would establish a separation of the tribe; because it was accomplished with the assurance that if the party was not satisfied they should be returned. It was merely an experiment. Yet even if that experimental separation had effected any change in the tribal autonomy, it would have

extended no further than to make a separate band of the 937 Northern Cheyennes who were removed. The whole party with Dull Knife and the other headmen numbered but little more than a third of the body which had been removed to the Indian Territory.

Suppose this band had not been destroyed; but that it had scattered upon being attacked, and had made its way in small parties to the old hunting grounds. What would then have been its situation? Can it be denied that it would again have been merged into its own tribe? With such facility would tribal allegiance be put off or taken on! With such rapidity would a body of Indians achieve an independence which they did not seek, and lose one which they never esteemed; while the citizens whose herds were driven away and whose homes were reduced to ashes appealed in vain to the Government, which answered that a handful of depredators—a sixth, or a tenth of their tribe—was a separate, independent band in hostility, for whose misdeeds there was no liability, and against whose violence there was neither protection nor redress.

Does Hostility Make the Band Independent?

It is contended in the *Montoya* case that as the band under Victorio was organized for hostility, that made it independent.

This contention entirely ignores the argument already made in the *Montoya* case that hostility may not be imputed to any other bodies than those having some element of nationality.

And it can have no application whatever to Dull Knife's party because it never had any organization.

But let us consider whether actual hostility can make a body of Indians an independent organization.

If Victorio's aggregation of Indians had been at peace

could a judgment have been awarded against them for a depredation committed by the Mescalero contingent?

If Dull Knife's party had stolen horses a day before the troops fired upon them would judgment have been awarded against that body, which had not, and never would have, even in theory, anything with which to satisfy the judgment? Or against the Northern Cheyenne tribe, which had tangible assets?

In answer to these questions we adapt the Attorney-General's statement in his brief (p. 4):

"It is admitted of course that there might be a body of Indians confederated together for a purpose which would be wholly lawful and that a band of Indians might be confederated together even for an unlawful purpose without bringing themselves within the meaning of the statute."

Now if as the Attorney-General says, there may be bands which are not yet "bands" within the intent of the statute, why shall we not say that the Indians with Victorio and Dull Knife were such; and were not therefore responsible as bodies as long as they were in relations of actual peace? And that the several tribes to which they belonged would be responsible?

And do we not then resolve that the effect of the Attorney-General's argument is to maintain that the hostility of a party of Indians, not a band within the statute, makes it *ipso facto* a band within the statute?

And do not like results follow from the court's opinion which declares that prior to the removal of the Northern Cheyennes to the Indian Territory they were not a band in any sense? For they did nothing after their removal to accomplish their independence.

And we take from the court's finding in this case:

"These so-called bands had no autonomy and had not been recognized as separate entities. They were natural segregations of Indians leading a nomadic life."

And from the opinion:

"The so-called bands were not then bands in a tribal, political, or military sense."

And from the repeated statement that—

"The principle * * * was that a tribe in amity could not be made responsible for the acts of its members engaged in organized warfare."

Dobbs v. *U. S.* 33 C. Cls. 308, 314.
Salois v. *U. S.* 33 C. Cls. 326.

Are we not then thoroughly confirmed in our statement that the court holds that body which is not a band within the meaning of the statute to become, with the moment of hostility even though enforced, a "band" within the meaning of the statute?

If there can be such a thing, then there is named as proper defendants, in the statute, a party or body of Indians against whom it would be impossible to render a judgment; for not being a band until they became hostile, judgment against them could not be recovered, because they were hostile.

An Accidental Nation.

Moreover, if the Attorney-General's contention is correct, it results, that this band was created not by any treaties, nor by the laws of the country, nor by the recognition of the Government officers, nor by the recognition of the Indians themselves, nor by the voluntary hostility of the Indians, but by the enforced hostility of the Indians fired upon by a handful of troops, representing not a policy of a great government determined upon with the dignity or solemnity befitting so important a matter as the dismemberment of a tribe and the creation of other independent organizations, but acting under orders given in an emergency and in pursuance of the simple purpose to hold the Indians on the reservation.

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Certainly at the time of this hearing, it has resulted that a body of Indians has become a band within the intent of the statute by becoming hostile, while another body has become a band within the intent of the statute by refusing to become hostile.

The Reason For Different Terms.

The Attorney-General seeks to explain the use of the word "band" in the act of 1891 with the suggestion that in the course of the general legislation on this subject it had become known to the executive branch of the Government and to Congress that the Indians of the Southwest did not possess a national government; that they were divided up into numerous separate and independent bands, which severally had all the attributes of sovereignty ever possessed by any Indian tribe, and that it was the intention to provide against the hostility of a band. In this suggestion, the Attorney-General must have overlooked the fact that this is an act not designed to defeat claims for Indian depredations, but to provide for the payment of them, and that whatever language was employed by Congress in the act, unless in the nature of a prohibition or an express condition, must be taken as used to accomplish the general design of the act. Therefore may we not say with much greater reason that Congress was apprised from the treaties which constituted a part of its volume of laws, and from the statutes which had been passed by its body, that there were aggregations of Indians known to the laws as "nations," other aggregations known as "tribes," and others still known as "bands," and that as this act was a claim-paying act and not a claim-defeating act it was the intention of Congress in its employment of these three words to provide that a claimant who had lost property at the hands of the In-

dians should recover from the body to which they belonged whether known to the laws as a "nation" or as a "tribe" or as a "band."

The Tribal Obligation.

The Attorney-General, while admitting that the tribe is bound to restrain its own members, declares in the *Montoya* case that the Mescaleros "were not obliged to go to war with Victorio's band to reclaim former members of their tribe who had joined that band."

What application does this answer have in this case, where all the Indians who committed the depredation were members of one tribe, to control whom it would not have been necessary for the Northern Cheyenne tribe to go to war with another tribe?

Of course if there is any force to be imputed to this suggestion of the Attorney-General it must fit the conditions in both of these cases. That it can have no application is illustrated in the different compositions of the bodies of Indians who committed the depredations in these two cases.

Instances of Tribal Combination and Separation.

Confined to one reservation to-day, given the same rations of bread, meat and potatoes, given the same annuities, and paid the same amounts per capita, derived from the rent of their lands or from other sources, are maintained together two tribes whose misdeeds have filled many a page of the history of the great Southwest—the Kiowas and Comanches. Between them there is an irreconcilable difference of blood so vast that union between a Comanche and a Kiowa is aboriginal miscegenation. Yet the Government by numerous treaties with these two tribes has confederated them together (15 Stat. L. 589), and it results that the two bodies of Indians are

regarded as one tribe. In this illustration is afforded an instance of the establishment of a body of Indians by governmental authority—by the political branch of the Government.

Greatest among all Indian peoples have been the Sioux. Many treaties were made with them as a nation at times when they numbered forty or fifty thousand souls. Among these were numerous bodies of Indians scattered from Minnesota to Montana and from Kansas to the British possessions, but maintaining themselves in compact bodies and in different localities and having linguistic differences to a very considerable extent. When these facts were discovered this great nation of Indians was found to consist of ten or twelve bands, all recognized as separate and independent by the Indians; hence a similar recognition was given by the Government. That the recognition was just appears from the fact that when Red Cloud with the Ogallalas waged a war in 1866, which resulted in the loss of Lieutenant Fetterman and a hundred soldiers, Spotted Tail, the great chief of the Brules, was an ally of the United States. *Massacres of the Mountains*, pp. 481, 482.

The Ogallallas numbered in 1891, five thousand souls; the Brules, thirty-five hundred; the Yanktons, seventeen hundred; the Yanktonnais, four thousand (Rep. Commr. Ind. Affrs. 1891, vol. 2, pp. 78–85). All these were known and treated with as bands (14 Stat. L. 695–747). They are the "bands" of this statute.

The noblest Indian of this day is Chief Joseph of the Nez Perces, who in 1866 declined to sign the treaty which gave up to the whites the old home of his fathers. This action brought about a separation of the tribe and resulted in a transfer of a portion of the tribe to another and a distant location. In these two locations the two bodies of Indians were maintained as separate and dis-

tinct entities, so that when, in 1877, Chief Joseph went to war even his former brethren, the members of his tribe, joined the United States troops in his punishment. Here is afforded an illustration of the recognition of different bodies of Indians as bands, for this body under Chief Joseph is known to treaty and to law and to the court's decisions as Joseph's band of Nez Perces. That is a band such as this statute contemplates. *Woolverton* v. *United States*, 29 C. Cls. 107.

In New Mexico, from the earliest date when we have an acquaintance with its history, was another populous body of Indians, brave, warlike, intelligent and rich in flocks and herds, numbering perhaps twenty thousand souls — the Navajos. So far as official records go and so far as history goes, there was never by these Indians or by the Government a recognition of a single independent band among all this vast body.

And yet the dockets of the court show many cases where bodies of these Indians numbering five to a hundred, have swept through the prairies of New Mexico, driven away the cattle and sheep and taken captive or slain the unsuspecting herders.

Those bodies though performing these hostile acts are not the bands of the statute, but the "bad men among the Indians," for whose misdeeds very many of our treaties provide, that the tribe shall make compensation.

Who is the Proper Defendant.

Many nice refinements and distinctions have been built up in the construction of this act to which it is neither proper nor desirable to allude. Least maintainable of all, we submit, is that which invests with independence a motley body of Indians, who if white, would have been jailed as a mob of rioters; who if themselves the immediate subjects of a civilized government of their

own race would have been punished under its criminal laws.

The recital, in the opinion, of the cruel and heartless treatment of Dull Knife's party of Cheyennes will touch every generous chord in the human heart. Yet it is but one instance of many that may be told. Possibly in recognition of the mistakes we have made in our treatment of the savage tribes, the Government, though in theory it charges up these judgments to the tribes, pays them in fact out of its own coffers.

If for some depredation, committed before the troops fired on Dull Knife's party, a judgment should be rendered, the accounting officers would look in vain for the account to which that judgment was to be charged. Not because Dull Knife died, and those who were with him, but because they could not find upon their books or in any books the name of the departed chieftain as one who was known to our laws or treaties as the leader of a band, tribe, or nation.

Is it not more consonant with the very sense of the law and with the very reason of things to say that if a body of Indians was a "band" or a "tribe" or a "nation" it was that body which was to respond for the misdeeds of its members, and that it was the status of that body which was to determine the jurisdiction of the court;—and not the status of one or more of its several constituent elements or families whose members may have participated in the wrongful act?

It would appear that the Court of Claims gave the correct definition of the body of Indians to be held responsible, in the words:

"The Indian entity or body politic which may be entitled to receive annuities which is or may be recognized as such in the Interior Department, and consequently which may be liable to respond in damages (*Dobbs* v. *U. S.* 33 C. Cls. 315)."

There is a statute so clear and plain—so unnecessary to be interpreted and yet so comprehensive, that it points unmistakably the way to the proper settlement of these questions. It is that statute which recognizes *tribal organization*, and *its* status as determining the condition of hostility.

It provides R. S. § 2080, that—

"Whenever the tribal organization of any Indian tribe is in actual hostility to the United States, the President is authorized by proclamation to declare all treaties with such tribe abrogated by such tribe, if in his opinion the same can be done consistently with good faith and legal and national obligations."

What better rule for determining the status of a tribe than this one which directs us to a consideration of the status of the tribal organization? What safer guide to a correct determination of what body of Indians is meant in the descriptive words of the act of 1891, than this, which recognizes hostility as possible only upon the part of a body *having a tribal organization?*

When formerly it seemed to the Court of Claims that a permanent and not a temporary body, a determinate and not a varying constituency, was a band or tribe, it said:

"Where a small body of Indians or a minority of a tribe, without the consent of such tribe, engage in such a raid, though they encounter United States troops and engage them in battle, the condition of amity between such tribe and the United States will not thereby be changed.

"In other words, the amity of the band, tribe or nation with the United States is alone involved under the act of 1891, and that condition may exist, though a small party therefrom, as in the case at bar, raid on citizens and commit depredations." *Leighton* v. *United States*, 29 C. Cls. 288.

In the statute just cited, and in this opinion may be

found all the law necessary to determine these questions we have considered. To lose sight of them is to become involved in perplexing inquiries and subtle distinctions, such, we may venture, as were never contemplated by the makers of the law.

Instances of mistreatment of the Indians must be a part of our history. Volumes have been written on the subject. Instances of theoretical hardship, in being judgment debtors on account of depredations will multiply. But surely these shall not prevail to obscure the legal wrongs, or defeat the clear statutory rights of our citizens whom Indians have reduced to poverty and ruin.

Primary and Ultimate Facts.

In the argument of the preceding case a question was asked in regard to the right of this court to review the conclusions of the Court of Claims upon matters of fact deduced from primary facts found from the evidence. The rule uniformly followed was stated in *United States* v. *Pugh*, 99 U. S. 270. It is as follows:

"The inquiry thus presented is as to the legal effect of facts proved, not of the evidence given to make the proof; and the question of practice to be settled is whether, under our rule, the judgment of the Court of Claims as to the legal effect of what may, perhaps not improperly, be called the ultimate circumstantial facts in a case, is final and conclusive, or whether it may be brought here for review on appeal.

"To avoid misapprehension in the future, we take this opportunity to say that we not only think such a judgment may be reviewed here if the question is properly presented, but that when the rights of the parties depend upon circumstantial facts alone, and there is doubt as to the legal effect of the facts, it is the duty of the court, when requested, to so frame its findings as to put the doubtful question into the record. This would not require us on the appeal to decide upon the weight of

evidence. That is done in the court below, when the particular fact is found which the evidence tends to prove. The effect of mere evidence stops when the fact it proves is established. After that the question is as to the effect of the fact; and when the evidence in a case has performed its part and brought out all the facts that have been proved, these facts thus established are to be grouped and their legal effect as a whole determined. If the case could come here in such a form as to require us to consider the evidence, we should be required to trace the evidence to its logical results, find in this way all the facts that had been proven, and then declare the final legal conclusion. The rule relieves us from the necessity of considering the evidence at all, and confines our attention to the legal effect upon the rights of the parties of the facts proven as they have been sent up from the court below. In this way the weight of the evidence is left for the sole consideration of the court below, but the ultimate effect of the facts which the direct evidence has established is left open for review here on appeal. The position which the case occupies when it comes here under such circumstances is precisely the same as it would be if the facts, instead of being found by the court, had been agreed upon by the parties, and their agreement embodied in the record."

Other cases bearing on this point are *United States* v. *Clark*, 96 U. S. 40; *McClure* v. *United States*, 116 U. S. 151. In the case of *Marks* v. *United States*, 161 U. S. 297, the Court of Claims found that the Indians charged were not in amity with the United States. That did not prevent this court from taking up the primary facts found from the evidence and considering whether the ultimate conclusions of fact were justified by these.

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